FILE COPY

FILED
JAN 26 1934
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1933.

STATE OF FLORIDA, EUGENE S. MATTHEWS, MAMIE EATON-GREENE, AND W. B. DOUGLASS, ETC., ET AL.,

Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, GEORGIA PUBLIC SERVICE COMMISSION, AND ATLANTIC COAST LINE RAILROAD,

Appellees.

No. 342.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION.

SEPARATE BRIEF FOR APPELLANT, WILSON LUMBER COMPANY OF FLORIDA, SUGGESTING EFFECT OF CHANGE IN GOVERNING STATUTE SUBSEQUENT TO DECISION OF COURT BELOW.

J. V. NORMAN,
Louisville, Ky.,
Attorney for Wilson Lumber Co. of Florida.

WESTERFIELD-BONTE COMPANY, INCORPORATED, LOUISVILLE, KY.

INDEX.

	PAGE
Reference to official report of the opinion delivered in the District Court and the reports and orders of the Interstate Commerce Commission	1
Statement as to Jurisdiction	2
Statement suggesting change in governing statute subsequent to decision of the Court below	3
Argument as to effect of the change in the statute	5
Conclusion	12

TABLE OF CASES CITED.

	PAGES
Dayton-Goose Creek R. R. v. U. S., 263 U. S. 455	6, 8
Georgia Public Service Commission v. A. C. L. R. Co., 186 I. C. C. 157	2
Georgia Public Service Commission v. A. C. L. R. Co., 190 I. C. C. 588	2
New York v. U. S., 257 U. S. 591	10
Shreveport Case (Houston, E. & W. T. R. Co. v. U. S.), 234 U. S. 342	6
State of Florida, et al., v. U. S. of A., et al., 4 F. Supp. 477	2
State of Florida, et al., v. U. S., 282 U. S. 194	10
United States v. Alaska Steamship Co., 253 U. S. 113	3
United States v. State of Louisiana, —— U. S. —— (decided November 6, 1933)	10
Wisconsin Railroad Commission v. C. B. & Q. R. Co., 257 U. S. 563	5, 10

TABLE OF STATUTES CITED.

Emergency Railroad Transportation Act, 1933, Section 205, approved June 16, 1933	3, 7, 8, 10
Interstate Commerce Act, as amended by the Transportation Act of 1920 (41 Stat. at L. 474)	4, 8
Section 13 (4)	5, 6
Section 15a	5, 6, 10, 11, 12

IN THE

Supreme Court of the United States

October Term, 1933.

STATE OF FLORIDA, EUGENE S. MATTHEWS, MAMIE EATON-GREENE, AND W. B. DOUGLASS, ETC., ET AL.,

Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, GEORGIA PUBLIC SERVICE COMMISSION, AND ATLANTIC COAST LINE RAILROAD,

Appellees.

No. 342.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION.

SEPARATE BRIEF FOR APPELLANT, WILSON LUMBER COMPANY OF FLORIDA, SUGGESTING EFFECT OF CHANGE IN GOVERNING STATUTE SUBSEQUENT TO DECISION OF COURT BELOW.

Reference to Official Report of the Opinion Delivered in the District Court and the Reports and Orders of the Interstate Commerce Commission.

The opinion of the Court below was rendered and filed in the Clerk's office on February 24, 1933, and is

cited as "State of Florida, *et al.*, v. United States of America, *et al.*, reported in 4 F. Supp. 477." The reports and orders of the Interstate Commerce Commission are dated respectively July 5, 1932, and are cited, "Georgia Public Service Commission v. Atlantic Coast Line Railroad Company," reported in 186 I. C. C. 157, and January 9, 1933, cited, "Georgia Public Service Commission v. Atlantic Coast Line Railroad Company," reported in 190 I. C. C. 588.

Statement as to Jurisdiction.

On April 19, 1933, the appellants filed and served upon all opposing counsel their separate typewritten statement in compliance with paragraph 1 of Rule 12 of the Revised Rules of Practice of this Court. Under date of May 1, 1933, the Atlantic Coast Line Railroad Company, one of the appellees, filed its typewritten statement against the jurisdiction of this Court, including a motion to dismiss the appeal or affirm the decision of the lower Court. Briefs upon the motion to dismiss or affirm were filed by the appellants and said appellee, and on October 9, 1933, this Court noted probable jurisdiction in the case and ordered that further consideration of the motion to dismiss or affirm be postponed to the hearing of the case on the merits.

STATEMENT SUGGESTING CHANGE IN GOVERNING STATUTE SUBSEQUENT TO DECISION OF THE COURT BELOW.

This appellant has joined with other appellant lumber companies in a brief containing a full statement and discussion of the issues arising under the statute in effect at the time the order of the Interstate Commerce Commission and the judgment of the lower Court were entered and nothing there said will be here repeated. The sole purpose of this separate brief is to present the suggestion that the order of the Interstate Commerce Commission, here in issue, even if valid when made, which is, of course, not conceded, must now be set aside because the statute, upon which rested the authority to make such order, has now been repealed and a new statute enacted. The amendment of the statute was by Act of Congress, approved by the President June 16, 1933, being Section 205 of the "Emergency Railroad Transportation Act, 1933." Of course, this amendment was not only subsequent to the making of the order here in issue, but also subsequent to the decision of the lower Court. The question we raise is therefore not presented by any assignment of error but this Court takes judicial notice of acts of Congress and in now raising this question we rely upon the authority of *United States* v. *Alaska Steamship Co.*, 253 U. S. 113. That case arose on a petition filed by numerous interstate carriers and carriers by water against the United States and Interstate Commerce

Commission to set aside and enjoin an order of the Interstate Commerce Commission prescribing certain forms of bills of lading to be used by such carriers in domestic and export transportation. The case was heard by three Judges, as required by statute, and an order was entered refusing to dismiss the petition and granting an injunction *pendente lite*.

Subsequent to the decision of the lower Court, and while the case was on appeal to this Court, Congress passed an act known as "The Transportation Act of 1920," which terminated the Federal control of railroads and amended in various particulars previous acts to regulate interstate commerce. This Court, taking notice of said act, entered an order requesting counsel to file briefs concerning the effect of the change in the act upon the pending case. This Court thereupon held that the change in the act would necessarily require changes in the forms of the bills of lading and that therefore the effect of the enactment of the statute was to make the case a moot one, although the question of the power of the Commission to prescribe bills of lading was "still existent" and not modified by the provisions of the new law. This, of course, was a holding in effect that the order of the Commission was invalid because of the change in the act. This Court thereupon reversed the case and remanded it to the lower Court, with directions to dismiss the petition "without prejudice to the right of the complainants to assail in the future any order of the Commission prescribing bills of lading after the enactment of the new legislation."

The order of the Interstate Commerce Commission, here in issue, is by its terms a continuous order but if we are correct in the views here expressed, even were it valid when made, it became invalid on June 16, 1933, when the statute, on which rested the authority to make such order, was amended. We, therefore, take if that it is appropriate to here suggest the repeal of the statute, upon which rested the authority to make the order here in issue, and the enactment of new provisions in lieu thereof, and to briefly discuss the effect thereof.

ARGUMENT AS TO EFFECT OF THE CHANGE IN THE STATUTE.

The order of the Interstate Commerce Commission, here in issue, is based solely on the power of the Commission to change intrastate rates to remove a revenue burden on interstate commerce, the Commission having expressly refused to find the existence of discrimination against persons and localities. The power to change intrastate rates in order to remove a revenue burden on interstate commerce generally, was never expressly granted in any of the acts of Congress and was first found by interpretation, by this Court, in the case of *Wisconsin Railroad Commission* v. *C. B. & Q. R. Co.*, 257 U. S. 563, because of the "dovetail relation" between Section 13 (4) and Section 15a (2) of the Interstate Commerce Act, as amended by the Transportation Act of 1920 (Sections 416-422, 41 Stat. at L., 484-488, Chap. 91, U. S. C. Title 49). Prior to

the enactment of the Transportation Act, this Court had upheld the power of the Interstate Commerce Commission to remove "unjust discrimination against persons and localities in interstate commerce. *Shreveport case* (*Houston, E. & W. T. R. Co. v. U. S.*), 234 U. S. 342. By Section 13 (4), which was added by the Transportation Act of 1920, Congress authorized the Commission to remove "unjust discrimination against interstate commerce" and by Section 15a (2) provided that the Commission should "initiate, modify, establish or adjust" rates so that the carriers, as a whole or in groups, will, under honest and efficient management, "earn an aggregate annual net railway operating income, equal as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation." Other subsections of Section 15a, there being eighteen in all, set up an elaborate plan for carrying out the provisions of subsection 2 thereof, and provided, among other things, for the maintenance of uniform rates, recapture of excess earnings, and the loaning of same to weaker lines. (Section 13 (4) and Section 15a are reproduced in full in the Appendix hereto).

This Court summarized the provisions of Section 15a, as it then stood, in *Dayton Goose Creek Railroad v. U. S.*, 263 U. S. 455, as follows:

> "Title 4 of the Transportation Act, embracing 418 and 422, is carefully framed to achieve its expressly declared objects. Uniform rates enjoined for all shippers will tend to divide the

business in proper proportion so that when the burden is great, the railroad of each carrier will be used to its capacity. If the weaker roads were permitted to charge higher rates than their competitors, the business would seek the strong roads with the lower rates and congestion would follow. The direction given to the Commission in fixing uniform rates will tend to put them on a scale enabling a railroad of average efficiency among all the carriers of the section to earn the prescribed maximum return. Those who earn most must hold one-half of the excess primarily to preserve their sound economic condition and avoid wasteful expenditures and unwise dividends. Those who earn less are to be given help by credit secured through a fund made up of the other half of the excess. By the recapture clauses Congress is enabled to maintain uniform rates for all shippers and yet keep the net returns of the railways, whether strong or weak, to the varying percentages which are fair respectively for them."

By an Act of Congress, entitled "The Emergency Railroad Transportation Act, 1933," approved by the President June 16, 1933, this entire plan and the elaborate machinery set up to carry it out, is abandoned, and in lieu thereof, under Table 2, "Amendments to Interstate Commerce Act," Section 205 provides:

"Section 15a of the Interstate Commerce Act, as amended (U. S. C., Title 49, Sec. 15a), is amended to read as follows:

"15a (1) When used in this section, the term 'rates' means rates, fares and charges, and all

classifications, regulations, and practices relating thereto.

"(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenue sufficient to enable the carriers, under honest, economical and efficient management, to provide such service."

This constitutes the entire section as amended and it will be noted that the amended act contains no provision for the earning of a fair return by the carriers, for the maintenance of uniform rates, for the recapture of excess earnings (referred to by this Court in the *Dayton Goose Creek Case, supra,* as "the key provision of the whole plan"), or for the loaning of money to the weaker carriers.

By the amendment the entire plan of the Transportation Act of 1920, as embodied in Section 15a of the Interstate Commerce Act, to treat the railroads as a unit, provide for the maintenance of uniform rates and to have the Commission initiate, modify, establish or adjust such rates" so that the carriers, as a whole, or in groups, should earn a fair return, is now abandoned. In lieu thereof is the simple direction that "in the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors," etc. Thus it is that the elaborate Act, upon which the Interstate

Commerce Commission relied as giving jurisdiction to enter the order in question, has now been superseded by the direction that in prescribing rates "the Commission shall give due consideration, among other factors," to three named factors, to-wit: (1) The effect of the rates on the movement of traffic; (2) the need, in the public interest, of adequate and efficient railway transportation service at the lowest possible cost consistent with the furnishing of such revenue; and (3), the need of revenue sufficient to enable the carriers to provide such service.

Thus the new Act is nothing more than an enumeration of some of the factors to which the Commission shall "give due consideration in the exercise of its power to prescribe just and reasonable rates."

Congress is presumed to have amended the Act with knowledge of the interpretation which this Court had placed upon it and therefore with knowledge that such repeal carried with it the repeal of the power of the Commission to fix intrastate rates to remove a revenue burden from interstate commerce. The individual carrier is, of course, still protected from the prescription by State authority of rates so low as to be confiscatory, and Congress, having repealed the Act by which it sought to establish the unified system of transportation, has left the individual railroads to their rights under general law.

The question here is whether, under the new Section 15a (2), there is any requirement that the Court, by interpretation, should vest in the Interstate Commerce Commission the power to fix individual intra-

state rates to remove a revenue burden on interstate commerce. All the cases in which this Court has sustained the power of the Interstate Commerce Commission to fix intrastate rates to remove a revenue burden, even under the old Section 15a, were "general revenue cases" where the Commission, in order to comply with the revenue provision of the act, prescribed a general level for interstate rates and required intrastate rates to be brought up to that level. *Wisconsin Railroad Commission* v. *C. B. & Q. R. Co.*, 257 U. S. 563; *New York* v. *U. S.*, 257 U. S. 591; *State of Florida, et al.*, v. *U. S.*, 282 U. S. 194; *U. S.* v. *State of Louisiana*, —— U. S. —— (decided November 6, 1933, not yet reported). This is the only case to come before this Court even under the old act in which the Commission has undertaken to require the changing of a particular intrastate rate over one railroad in order to remove a revenue burden.

It is respectfully submitted that even if the power here sought to be exercised existed under the old Section 15a, a proposition which we have always contested, no such power could possibly be found in the new Section 15a. The language of the new act affords no basis for an interpretation that Congress intended to thereby vest in the Interstate Commerce Commission power to fix intrastate rates for the purpose of removing a revenue burden on interstate commerce. As to the vital question of revenue, the affirmative duty which the old Act imposed on the Commission to "initiate, modify, establish or adjust" rates so that the carriers as a whole or in groups should earn a given

return is supplanted by the requirement that the Commission shall "give due consideration," among other things, "to the need of revenue sufficient to enable the carriers" to provide adequate and efficient service at the lowest possible cost consistent with the furnishing of such service. Clearly the new act does not require uniformity of rates, distribution of traffic or revenues, revenue sufficient to provide for the carriers, as a whole or in groups, a given percentage return on investment, nor in fact does it include any of the numerous provisions of the old act.

In order to carry out the purpose of the elaborate plan set up by the old Section 15a, this Court found that it was necessary that the Interstate Commerce Commission be given power to remove a revenue burden on interstate commerce by raising intrastate rates to the level prescribed for interstate rates. Now that the plan itself has been abandoned there is no occasion for finding, by interpretation, the existence of the extraordinary power which this Court held was necessary to carry out the purpose of the plan. No longer will revenues, provided for a given carrier, contribute to the maintenance of a general transportation system, for under the new act this revenue, no matter how great, is retained by the carrier collecting it. It cannot be said that the maintenance of a particular intrastate rate on one commodity over one railroad can have any such direct relation to the purpose of the new act as to justify a finding by interpretation of the extraordinary power in a Federal tribunal to invade the domain of State authority and fix intrastate rates.

Under the old Section 15a the affirmative duty of the Commission, with respect to fixing rates, related to *all* carriers as a whole, or to *all* in each rate group as a whole, and to *aggregate* income, as distinguished from the income of a particular carrier. The rates to be prescribed to accomplish the purpose of the act were to be uniform rates, under which some carriers would earn more than a fair return and this was to be recaptured and loaned to the weaker carriers. Under the new Section 15a this plan of treating the carriers as a whole has been abandoned. Surely it cannot be reasonably contended that in order to carry out the provisions of the new Section 15a, which are confined to designating some factors, which, among others, are to be considered in making interstate rates, it is necessary for the Interstate Commerce Commission to invade the domain of State authority to fix intrastate rates on a given commodity over a single railroad. We submit that proper administration of the new act does not require that interpretation go to such lengths.

CONCLUSION.

For the reasons fully set forth in the principal brief of the appellant lumber companies, it is respectfully submitted that the order of the Interstate Commerce Commission, here under attack, should be set aside as invalid when made, and only by such action can the rights of those who have paid the unlawful rates be protected. But should the Court not so conclude, then it is respectfully submitted that said order became in-

valid with the passage, on June 16th, 1933, of the amendment repealing the provisions of the act upon which rested authority to make such order.

Should the Court not hold the order void *ab initio* but concur in the view here expressed as to the effect of the amendment to the statute, it would seem that in any event the order of the Interstate Commerce Commission should be held invalid and the case remanded to the lower Court, with directions to enter judgment setting it aside and enjoining its future enforcement.

Whatever be the judgment of the Court, we trust we are justified in thus bringing to the attention of the Court the matter of the change in the governing statute and its probable effect on the proper disposition of this case.

Respectfully submitted,

J. V. NORMAN,
Louisville, Ky.,
Attorney for Wilson Lumber Co. of Florida.

APPENDIX.

STATUTES REFERRED TO

SECTION 13 (4) OF INTERSTATE COMMERCE AC

"(4) Whenever in any such investigation the Commi sion, after full hearing, finds that any such rate, fa charge, classification, regulation, or practice causes a undue or unreasonable advantage, preference, or prej dice as between persons or localities in intrastate co merce on the one hand and interstate or foreign co merce on the other hand, or any undue, unreasonable, unjust discrimination against interstate or foreign co merce, which is hereby forbidden and declared to be u lawful, it shall prescribe the rate, fare, or charge, or t maximum or minimum, or maximum and minimum, ther after to be charged, and the classification, regulation, practice thereafter to be observed, in such manner as, its judgment, will remove such advantage, preferenc prejudice, or discrimination. Such rates, fares, charg classifications, regulations, and practices shall be observ while in effect by the carriers parties to such proceedi affected thereby, the law of any State or the decision order of any State authority to the contrary notwit standing."

SECTION 15a OF THE INTERSTATE COMMERCE ACT.

Sec. 15a. [*Added February 28, 1920.*] [*U. S. Cod title 49, sec. 15a.*] (1) When used in this section t term "rates" means rates, fares, and charges, and classifications, regulations, and practices, relating theret

the term "carrier" means a carrier by railroad or partly by railroad and partly by water, within the continental United States, subject to this Act, excluding (a) sleeping-car companies and express companies, (b) street or suburban electric railways unless operated as a part of a general steam railroad system of transportation, (c) interurban electric railways unless operated as a part of a general steam railroad system of transportation or engaged in the general transportation of freight, and (d) any belt-line railroad, terminal switching railroad, or other terminal facility, owned exclusively and maintained, operated, and controlled by any State or political subdivision thereof; and the term "net railway operating income" means railway operating income, including in the computation thereof debits and credits arising from equipment rents and joint facility rents.

(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: *Provided*, That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country.

(3) The Commission shall from time to time determine and make public what percentage of such aggregate property value constitutes a fair return thereon, and such

percentage shall be uniform for all rate groups or territories which may be designated by the Commission. In making such determination it shall give due consideration, among other things, to the transportation needs of the country and the necessity (under honest, efficient and economical management of existing transportation facilities) of enlarging such facilities in order to provide the people of the United States with adequate transportation: *Provided*, That during the two years beginning March 1, 1920, the Commission shall take as such fair return a sum equal to 5½ per centum of such aggregate value, but may, in its discretion, add thereto a sum not exceeding one-half of one per centum of such aggregate value to make provision in whole or in part for improvements, betterments or equipment, which, according to the accounting system prescribed by the Commission, are chargeable to capital account.

(4) For the purposes of this section, such aggregate value of the property of the carriers shall be determined by the Commission from time to time and as often as may be necessary. The Commission may utilize the results of its investigation under section 19a of this Act, in so far as deemed by it available, and shall give due consideration to all the elements of value recognized by the law of the land for rate-making purposes, and shall give to the property investment account of the carriers only that consideration which under such law it is entitled to in establishing values for rate-making purposes. Whenever pursuant to section 19a of this Act the value of the railway property of any carrier held for and used in the service of transportation has been finally ascertained, the value so ascertained shall be deemed by the Commission to be the value thereof for the purpose of determining such aggregate value.

(5) Inasmuch as it is impossible (without regulation and control in the interest of the commerce of the United States considered as a whole) to establish uniform rates upon competitive traffic which will adequately sustain all the carriers which are engaged in such traffic and which are indispensable to the communities to which they render the service of transportation, without enabling some of such carriers to receive a net railway operating income substantially and unreasonably in excess of a fair return upon the value of their railway property held for and used in the service of transportation, it is hereby declared that any carrier which receives such an income so in excess of a fair return, shall hold such part of the excess, as hereinafter prescribed, as trustee for, and shall pay it to, the United States.

(6) If, under the provisions of this section, any carrier receives for any year a net railway operating income in excess of 6 per centum of the value of the railway property held for and used by it in the service of transportation, one-half of such excess shall be placed in a reserve fund established and maintained by such carrier, and the remaining one-half thereof shall, within the first four months following the close of the period for which such computation is made, be recoverable by and paid to the Commission for the purpose of establishing and maintaining a general railroad contingent fund as hereinafter described. For the purposes of this paragraph the value of the railway property and the net railway operating income of a group of carriers, which the Commission finds are under common control and management and are operated as a single system, shall be computed for the system as a whole irrespective of the separate ownership and accounting returns of the various parts of such system. In the case of any carrier which has accepted the

provisions of section 209 of this amendatory Act the provisions of this paragraph shall not be applicable to the income for any period prior to September 1, 1920. The value of such railway property shall be determined by the Commission in the manner provided in paragraph (4).

(7) For the purpose of paying dividends or interest on its stocks, bonds or other securities, or rent for leased roads, a carrier may draw from the reserve fund established and maintained by it under the provisions of this section to the extent that its net railway operating income for any year is less than a sum equal to 6 per centum of the value of the railway property held for and used by it in the service of transportation, determined as provided in paragraph (6); but such fund shall not be drawn upon for any other purpose.

(8) Such reserve fund need not be accumulated and maintained by any carrier beyond a sum equal to 5 per centum of the value of its railway property determined as herein provided, and when such fund is so accumulated and maintained the portion of its excess income which the carrier is permitted to retain under paragraph (6) may be used by it for any lawful purpose.

(9) The Commission shall prescribe rules and regulations for the determination and recovery of the excess income payable to it under this section, and may require such security and prescribe such reasonable terms and conditions in connection therewith as it may find necessary. The Commission shall make proper adjustments to provide for the computation of excess income for a portion of a year, and for a year in which a change in the percentage constituting a fair return or in the value of a carrier's railway property becomes effective.

(10) The general railroad contingent fund so to be recoverable by and paid to the Commission and all accretions thereof shall be a revolving fund and shall be

administered by the Commission. It shall be used by the Commission in furtherance of the public interest in railway transportation either by making loans to carriers to meet expenditures for capital account or to refund maturing securities originally issued for capital account, or by purchasing transportation equipment and facilities and leasing the same to carriers, as hereinafter provided. Any moneys in the fund not so employed shall be invested in obligations of the United States or deposited in authorized depositaries of the United States subject to the rules promulgated from time to time by the Secretary of the Treasury relating to Government deposits.

(11) A carrier may at any time make application to the Commission for a loan from the general railroad contingent fund, setting forth the amount of the loan and the term for which it is desired, the purpose of the loan and the uses to which it will be applied, the present and prospective ability of the applicant to repay the loan and meet the requirements of its obligations in that regard, the character and value of the security offered, and the extent to which the public convenience and necessity will be served. The application shall be accompanied by statements showing such facts and details as the Commission may require with respect to the physical situation, ownership, capitalization, indebtedness, contract obligations, operation, and earning power of the applicant, together with such other facts relating to the propriety and expediency of granting the loan applied for and the ability of the applicant to make good the obligation, as the Commission may deem pertinent to the inquiry.

(12) If the Commission, after such hearing and investigation, with or without notice, as it may direct, finds that the making, in whole or in part, of the proposed loan from the general railroad contingent fund is necessary to

enable the applicant properly to meet the transportation needs of the public, and that the prospective earning power of the applicant and the character and value of the security offered are such as to furnish reasonable assurance of the applicant's ability to repay the loan within the time fixed therefor, and to meet its other obligations in connection with such loan, the Commission may make a loan to the applicant from such railroad contingent fund, in such amount, for such length of time, and under such terms and conditions as it may deem proper. The Commission shall also prescribe the security to be furnished, which shall be adequate to secure the loan. All such loans shall bear interest at the rate of 6 per centum per annum, payable semiannually to the Commission. Such loans when repaid, and all interest paid thereon, shall be placed in the general railroad contingent fund.

(13) A carrier may at any time make application to the Commission for the lease to it of transportation equipment or facilities, purchased from the general railroad contingent fund, setting forth the kind and amount of such equipment or facilities and the term for which it is desired to be leased, the uses to which it is proposed to put such equipment or facilities, the present and prospective ability of the applicant to pay the rental charges thereon, and to meet the requirements of its obligations under the lease, and the extent to which the public convenience and necessity will be served. The application shall be accompanied by statements showing such facts and details as the Commission may require with respect to the physical situation, ownership, capitalization, indebtedness, contract obligations, operation, and earning power of the applicant, together with such other facts relating to the propriety and expediency of leasing such equipment or facilities to the applicant as the Commission may deem pertinent to the inquiry.

(14) If the Commission, after such hearing and investigation, with or without notice, as it may direct, finds that the leasing to the applicant of such equipment or facilities, in whole or in part, is necessary to enable the applicant properly to meet the transportation needs of the public, and that the prospective earning power of the applicant is such as to furnish reasonable assurance of the applicant's ability to pay promptly the rental charges and meet its other obligations under such lease, the Commission may lease such equipment or facilities purchased by it from the general railroad contingent fund, to the applicant for such length of time, and under such terms and conditions as it may deem proper. The rental charges provided in every such lease shall be at least sufficient to pay a return of 6 per centum per annum, plus allowance for depreciation determined as provided in paragraph (5) of section 20 of this Act, upon the value of the equipment or facilities leased thereunder. All rental charges and other payments received by the Commission in connection with such equipment and facilities, including amounts received under any sale thereof, shall be placed in the general railroad contingent fund.

(15) The Commission may from time to time purchase, contract for the construction, repair and replacement of, and sell, equipment and facilities, and enter into and carry out contracts and other obligations in connection therewith, to the extent that moneys included in the general railroad contingent fund are available therefor, and in so far as necessary to enable it to secure and supply equipment and facilities to carriers whose applications therefor are approved under the provisions of this section, and to maintain and dispose of such equipment and facilities.

(16) The Commission may from time to time prescribe such rules and regulations as it deems necessary to carry

out the provisions of this section respecting the making of loans and the lease of equipment and facilities.

(17) The provisions of this section shall not be construed as depriving shippers of their right to reparation in case of overcharges, unlawfully excessive or discriminatory rates, or rates excessive in their relation to other rates, but no shipper shall be entitled to recover upon the sole ground that any particular rate may reflect a proportion of excess income to be paid by the carrier to the Commission in the public interest under the provisions of this section.

(18) Any carrier, or any corporation organized to construct and operate a railroad, proposing to undertake the construction and operation of a new line of railroad may apply to the Commission for permission to retain for a period not to exceed ten years all or any part of its earnings derived from such new construction in excess of the amount heretofore in this section provided, for such disposition as it may lawfully make of the same, and the Commission may, in its discretion, grant such permission, conditioned, however, upon the completion of the work of construction within a period to be designated by the Commission in its order granting such permission.